SERVED: May 5, 1999

NTSB Order No. EA-4759

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of April, 1999

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. GERALD THOMPSON BLOSE, Respondent.	)	Docket SE-14519

ORDER DENYING RECONSIDERATION

Both the Administrator and the respondent have filed petitions for reconsideration of the Board's decision, NTSB Order No. EA-4656, served April 29, 1998.[1] In that decision, we affirmed all but one of the charges in the Administrator's complaint, finding that respondent violated 14 C.F.R. §§ 91.13(a), 91.111(a), and 91.119(b) when he operated a hot-air balloon through an area where an aircraft was performing aerobatic maneuvers and, to avoid a collision hazard with the airplane, dropped down low over a vast crowd of people assembled for the Three Rivers Regatta. We determined that the evidence

[1]Although termed a "Petition for Modification," we have treated respondent's filing as a petition for reconsideration. Respondent also filed a petition for rehearing, which we deny.

did not support a finding of a violation of section 91.119(a), which prohibits operation of an aircraft below an altitude where, if a power unit failed, an emergency landing could not be made without causing undue hazard to persons or property on the surface. As discussed below, both petitions are denied.

In his petition, respondent argues that the Board failed to consider that the Notice to Airmen (NOTAM) regarding the air show had expired by the time of his flight and had not been extended under the procedures of FAA Order 7930.2E. He, however, did not raise this issue on appeal and may not utilize a petition for reconsideration to offer arguments that he should have, but did not, advance on appeal. See Administrator v. Peacon, NTSB Order No. EA-4651 at 2 (1998) (Order denying reconsideration), citing Administrator v. Lambert, 4 NTSB 1373 (1984).[2] Matters not made part of the record at hearing may not be entertained for the first time in a petition for reconsideration unless the new information could not have been discovered by the exercise of due diligence before the hearing.[3] See 49 C.F.R. § 821.50(c).

Respondent contends that, since he was not participating in a Regatta-sponsored event, he was under no obligation to make any effort to ascertain the status of the air show. Again, we disagree. A pilot's deliberate decision to keep himself in ignorance is incompatible with safe flight. Respondent knew the Regatta was taking place and knew, or should have known, that the air show could run overtime. He nevertheless chose to take off without turning on his radio, checking the Regatta frequency, calling the tower, or taking any action whatsoever to ascertain whether the air show was still in progress. Respondent's inaction cannot now serve as a defense to his violation of the regulations.

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[2]In any event, Inspector Miller testified that, with the concurrence of the Pittsburgh tower, he extended the waiver for the airshow past the original waiver time of 6:30 p.m. (Tr. at 131.) We further note that there was no indication, through respondent's testimony about the actions he took directly before and during the flight, that he ever checked to see whether the airshow had concluded, whether the waiver had been extended, or even whether the NOTAM had been extended. Thus, even if the NOTAM had been revised, he would not have known.

[3]Another argument advanced by respondent concerns a photograph that he claims he recently obtained and could not have produced at the hearing. This also is new matter and, as such, under Board rule 821.50(c), must be supported by affidavits, authenticated documents, or an explanation of why such substantiation is unavailable. Respondent provides scant explanation and no supporting documentation. Under these circumstances, the Board will not consider this new material.

Respondent also argues that the base of Class B airspace over Pittsburgh is 3,000 feet MSL (mean sea level), not 3,000 feet AGL (above ground level) and that this distinction was not made at the hearing but, rather, was left ambiguous by the testimony of Inspector Lynn. Therefore, he continues, he did not have as much room to ascend when he saw the aerobatic plane as perhaps the law judge and the Board may have thought. Again, respondent makes this argument for the first time in his petition. Having forgone this contention in his appeal to the Board, he is foreclosed from making it now. Nevertheless, were we to entertain the argument, it would be unavailing since, even as respondent acknowledged, he had at least 1,000 - 1,200 feet between the balloon and the restricted airspace and could have chosen to ascend rather than drop down perilously close to thousands of spectators on the shore.[4] Furthermore, that his options were somewhat limited when he realized he had begun to traverse the area in the middle of an airshow is not, in any way, a mitigating factor for, as we noted already, this situation was "one of his own making." Administrator v. Blose, EA-4656 at 10.

As for the Administrator's petition, she asks that we reconsider our decision to dismiss the section 91.119(a) charge against respondent, stating that we failed to defer to her validly adopted interpretation of FAA regulations.[5] The Board's determination that insufficient evidence was introduced to support finding respondent had operated the balloon at an altitude that would not allow, if a power unit failed, an emergency landing without undue hazard to persons or property on the surface, the Administrator maintains, is contrary to her reasonable interpretation of the regulation and precedent. We disagree.

The Administrator misinterprets our decision, which does not stand for the proposition that the pilot of an aircraft with two or more power units can never be found to have violated section 91.119(a). Rather, we stated, quite simply, that the Administrator did not prove the violation by a preponderance in this instance. The regulation speaks to the possibility of

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[4]Respondent testified that, if he had ascended to 1,500 feet, he would have been "real close to class B air space," but "probably would not have been in it just yet." (Tr. at 218.)

[5]Section 91.119(a) states:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

making an emergency landing without undue hazard to persons or property on the surface when a power unit (singular) fails. No evidence was introduced at hearing to show that, in the event a power unit failed, respondent would be unable to maintain an altitude that would allow an emergency landing without undue hazard to those on the surface.

Respondent testified that the balloon was equipped with two independent burners, only one of which was necessary to keep the balloon aloft. (Tr. at 201-02.) The Administrator's witness, Inspector Conway, testified that respondent probably could not have made a safe landing if he had a "power failure," but acknowledged that he had "no idea" how many burners were on the balloon. (Tr. at 169-170.) This was the only evidence introduced by the Administrator on the subject. The inspector's testimony reveals an assumption, one echoed by the Administrator in her petition, that, under the regulation, the failure of a power unit is synonymous with a complete loss of power.

The explicit language of the regulation cannot reasonably be interpreted to mean that, no matter how many power units are still available, the failure of a power unit is equivalent to a total power failure. As set forth in her brief, the Administrator maintains that, "[w]hether the balloon had multiple, independent power units is irrelevant to a section 91.119(a) determination," and that the regulation assumes a powerless aircraft. Petition at 4-5. We cannot agree that these are reasonable interpretations of the regulation. The number of independent power units can be extremely relevant under section 91.119(a) if, when a power unit fails, the pilot could use the remaining power unit(s) to maintain altitude, ascend to what would be considered a safer altitude, or perhaps make an emergency landing without causing undue hazard to those on the surface.

Claiming the Board is departing from precedent, the Administrator points out that the Board has recognized section 91.119(a) as embodying the intent of section 307 of the Federal Aviation Act, namely, ensuring "the protection of persons and property on the surface from undue hazard caused by an emergency landing." Administrator v. Johnson, 3 NTSB 363, 364 (1977).[6] While we agree with the statement we made in Johnson, we do not believe that the phrase "if a power unit fails" may be read out of the regulation or ignored.[7]

[6]The Administrator refers to this case as "Carter." The respondent was identified as Ruth Carter Johnson and, therefore, we refer to the case as Administrator v. Johnson.

[7]The Administrator cites several cases which, she argues, support her claim that we have not in the past included the number of power units in the analysis of a 91.119(a) violation.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's petition for reconsideration is denied;

2. Respondent's petitions for reconsideration and rehearing are denied; and

3. The 90-day suspension of respondent's airman certificates shall begin 30 days from the service date indicated on this order.[8]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order.

(..continued)
However, none of those cases involved balloons, with or without more than one power unit, and none discussed the issue of whether the aircraft could be operated on, or an emergency landing could be made with, a remaining power unit if there should be a failure of a power unit. Further, the Administrator cited no precedent, and we are aware of none, for the proposition that a failure of a power unit is *always* equivalent to a complete loss of power. See Administrator v. Frost, NTSB Order No. EA-3856 (1993) (Hiller Model FH-1100 helicopter); Administrator v. Oeming, NTSB Order No. EA-3542 (1992) (Bell helicopter 206B); Administrator v. Henderson, 7 NTSB 1003 (1991), aff'd 7 F.3d 875 (9th Cir. 1993) (Bell helicopter 206B); Administrator v. Underwood, 3 NTSB 2015 (1979) (Piper PA-28-161); Administrator v. Eby, 3 NTSB 614 (1977) (Cessna 188B); and Administrator v. Robinson, 2 NTSB 1051 (1974) (Bell helicopter 47J2A) -- all single engine aircraft. For these reasons, we do not find these cases helpful or controlling in our analysis.

[8]For the purpose of this order, respondent must physically surrender his certificates to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(f).